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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 FELIX CAMACHO, ) Civil No. 08-0016-BEN(LSP)  
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12 ) Petitioner, ) REPORT AND RECOMMENDATION  
13 ) v. ) GRANTING RESPONDENT'S MOTION  
14 ) TO DISMISS (12-1)  
15 ) ROBERT HERNANDEZ, )  
16 ) Respondent. )  
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29 Felix Camacho ("Petitioner"), a state prisoner proceeding pro  
30 se, has filed a Petition For Writ of Habeas Corpus pursuant to 28  
31 U.S.C. §2254. Respondent has filed a Motion to Dismiss the  
32 Petition. Petitioner has not filed an Opposition to the Motion to  
33 Dismiss. The Court, having reviewed Petitioner's Petition,  
34 Respondent's Motion to Dismiss and the lodgments presented there-  
35 with, finds that Petitioner's Petition is barred by the statute of  
36 limitations. Therefore, the Court recommends that Respondent's  
37 Motion to Dismiss be GRANTED.

38 I

39 PROCEDURAL HISTORY

40 Petitioner pled guilty to kidnapping and inflicting corporal  
41 injury on a cohabitant [Cal. Penal Code<sup>1</sup> §§ 207(a), 237.5(a)] He  
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45 <sup>1</sup>All further references to code sections are to the California Penal Code, unless otherwise  
46 noted.

1 admitted that he personally used a deadly weapon in the kidnapping  
2 [§§ 12022(b)(1), 1192.7(c)(23)], inflicting great bodily injury in  
3 the infliction of corporal injury on a cohabitant [§ 12022.7(e)],  
4 two prior serious felony convictions [§ 667(a)(1)] and two strike  
5 priors [§667(b)-(i)]. The court denied Petitioner's motion to  
6 dismiss the strike priors and sentenced him to 33 years to life  
7 imprisonment. On September 22, 2004, Petitioner's convictions and  
8 sentence became final.

9 On January 26, 2005, Petitioner filed a Petition For Writ Of  
10 Habeas Corpus with the California Supreme Court. (Respondent's  
11 Lodgment No. 3) This Petition alleges that the trial court illegally  
12 enhanced Petitioner's sentence by not dismissing a prior strike. On  
13 January 4, 2006, the California Supreme Court denied the Petition.  
14 (Respondent's Lodgment No. 4).

15 On January 30, 2006, Petitioner constructively<sup>2</sup> filed a  
16 Petition For Writ Of Habeas Corpus with the San Diego Superior Court  
17 (Respondent's Lodgment No. 5). This Petition contains the same claim  
18 as noted above in Petitioner's Petition for Writ of Habeas Corpus to  
19 the California Supreme Court. On March 28, 2006, the Superior Court  
20 denied Petitioner's Petition. (Respondent's Lodgment No. 6).

21 On July 11, 2006, Petitioner filed a second Petition for Writ  
22 of Habeas Corpus with the San Diego Superior Court. (Respondent's  
23 Lodgment No. 7) This Petition contains the same claim as noted above  
24 in Petitioner's Petition for Writ of Habeas Corpus to the California  
25 Supreme Court and Petitioner's first Petition for Writ of Habeas  
26 Corpus to the San Diego Superior Court. On September 15, 2006, the

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27  
28 <sup>2</sup>The Court gives Petitioner the benefit of the "mailbox rule" which deems that a petition is  
constructively filed when it is delivered to prison officials for filing. Houston v. Lack 487 U.S.  
266(1988)

1 San Diego Superior Court denied Petitioner's second Petition for  
2 Writ of Habeas Corpus. (Respondent's Lodgment No. 8) On September  
3 22, 2006, Petitioner filed a Petition to Amend his second Petition  
4 with the San Diego Superior Court. (Respondent's Lodgment No. 9) The  
5 Superior Court did not rule on Petitioner's Petition to Amend.  
6 (Respondent's Lodgment No. 10)

7 On September 17, 2006, Petitioner filed a Petition for Writ  
8 of Habeas Corpus with the California Court of Appeal. (Respondent's  
9 Lodgment No. 11) On December 28, 2006, the Court of Appeal denied  
10 the Petition. (Respondent's Lodgment No. 12)

11 On May 13, 2007, Petitioner filed a Petition For Writ Of  
12 Habeas Corpus with the California Supreme Court. (Respondent's  
13 Lodgment No. 13). On September 25, 2007, the California Supreme  
14 Court denied the Petition. (Respondent's Lodgment No. 14).

15 On December 30, 2007, Petitioner filed a Petition For Writ Of  
16 Habeas Corpus with this Court.

## 17 II

### 18 PETITIONER'S PETITION IS BARRED

#### 19 BY THE STATUTE OF LIMITATIONS

#### 20 1. The AEDPA's One-Year Statute of Limitations.

21 Respondent argues that the Petition is barred by the  
22 Antiterrorism and Effective Death Penalty Act's ("the AEDPA")  
23 statute of limitations. The provisions of the AEDPA apply to  
24 petitions for writs of habeas corpus filed in federal court after  
25 the AEDPA's effective date of April 24, 1996. Lindh v. Murphy, 521  
26 U.S. 320, 117 S. Ct. 2059, 2068 (1997). Therefore, because the  
27 Petition was filed on December 30, 2007, the AEDPA applies to this  
28 case.

1 Prior to the enactment of the AEDPA on April 24, 1996, "state  
2 prisoners had almost unfettered discretion in deciding when to file  
3 a federal habeas petition." Calderon v. United States Dist. Court  
4 (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), cert. denied, 118  
5 U.S. 897 (1998), overruled on other grounds by Calderon v. United  
6 States Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998).  
7 "[D]elays of more than a decade did not necessarily bar a prisoner  
8 from seeking relief." Id.

9 With enactment of the AEDPA, a state prisoner's time frame  
10 for seeking federal habeas relief was dramatically limited. The  
11 AEDPA amended 28 U.S.C. § 2244 by, in part, adding subdivision (d),  
12 which provides for a one-year limitation period for state prisoners  
13 to file habeas corpus petitions in federal court. Section 2244(d)  
14 states, in pertinent part:

15 (d)(1) A 1-year period of limitation shall apply to an  
16 application for a writ of habeas corpus by a person in  
17 custody pursuant to the judgment of a State court. The  
limitation period shall run from the latest of -

18 (A) the date on which the judgment became  
19 final by the conclusion of direct review  
or the expiration of the time for seeking  
20 such review;

21 (B) the date on which the impediment to  
filing an application created by State  
22 action in violation of the Constitution or  
laws of the United States is removed, if  
23 the applicant was prevented from filing by  
such State action;

24 (C) the date on which the constitutional  
right asserted was initially recognized by  
25 the Supreme Court, if the right has been  
newly recognized by the Supreme Court and  
26 made retroactively applicable to cases on  
collateral review; or

27 (D) the date on which the factual predi-  
28 cate of the claim or claims presented could  
have been discovered through the exercise

1 of due diligence.

2 (2) The time during which a properly filed applica-  
3 tion for State post-conviction or other collateral  
4 review with respect to the pertinent judgment or claim  
is pending shall not be counted toward any period of  
limitation under this subsection.

5 28 U.S.C.A. § 2244(d)

6 On August 13, 2004, the Court of Appeal affirmed Petitioner's  
7 convictions and sentence. Petitioner did not seek the California  
8 Supreme Court's review of the Court of Appeal's decision. Peti-  
9 tioner's convictions and sentence became final on September 22,  
10 2004, 40 days after Petitioner could have sought such review by the  
11 California Supreme Court. Smith v. Duncan 297 F.3d 809, 813 (9<sup>th</sup> Cir.  
12 2002)

13 Therefore, absent tolling, Petitioner had until September 22,  
14 2005, to file his Petition For Writ of Habeas Corpus with this  
15 Court. However, Petitioner filed several petitions for post-  
16 conviction relief in the California Superior, Appellate and Supreme  
17 Courts. The statute of limitations is tolled while a "properly  
18 filed" state habeas corpus petition is "pending" in the state court.  
19 Under the holding of Nino v. Galaza 183 F.3d 1003, 1006 (9<sup>th</sup> Cir.  
20 1999), the "statute of limitations is tolled from the time the first  
21 state habeas petition is filed until the California Supreme Court  
22 rejects petitioner's final collateral challenge," provided the  
23 petitions were properly filed and pending during that entire time.  
24 The statute of limitations is not tolled from the time a final  
25 decision is issued on direct state appeal and the time the first  
26 state collateral challenge is filed because there is no case  
27 "pending" during that interval. Nino 183 F.3d at 1006

28 The meaning of the terms "properly filed" and "pending" in

1 Nino have been clarified by the United States Supreme Court. In  
2 Carey v. Saffold, 536 U.S. 214 (2002), the Court held that the time  
3 between denial in a lower California court and the filing of a  
4 subsequent petition in the next higher court does not toll the  
5 statute of limitations, if the petition is ultimately found to be  
6 untimely. Id. at 223-226. In Pace v. DiGuglielmo 544 U.S. 408  
7 (2005), the Court held that statutory tolling is not available for  
8 the period a petition is under consideration, if it is dismissed as  
9 untimely. Id. at 413

10 While statutory tolling may be available for intervals  
11 between ascending filings (ie. from Superior Court, to the Court of  
12 Appeal, to the Supreme Court), it is not available for the interval  
13 between descending filings, unless a petitioner is attempting to  
14 remedy a deficiency in the new filing. King v. Roe 340 F.3d 821, 823  
15 (9<sup>th</sup> Cir. 2003) Statutory tolling is similarly unavailable for the  
16 interval between successive filings in the same court. Dils v. Small  
17 260 F.3d 984, 986 (9<sup>th</sup> Cir. 2001)

18 Petitioner's first petition for relief after his convictions  
19 and sentence became final was filed on January 26, 2005 with the  
20 California Supreme Court. On January 4, 2006, the California  
21 Supreme Court denied the Petition. From September 22, 2004 (the  
22 date Petitioner's convictions and sentence became final) to January  
23 26, 2005 (the date Petitioner filed a Petition for Writ of Habeas  
24 Corpus with the California Supreme Court) (**126 days**), the statute of  
25 limitations was **not tolled** because there was no case pending during  
26 that interval. Nino 183 F.3d at 1006

27 Thereafter, on January 30, 2006, Petitioner filed a Petition  
28 for Writ of Habeas Corpus in the San Diego Superior Court. On March

1 28, 2006, the San Diego Superior Court denied the Petition.

2 From January 4, 2006 (the date the California Supreme Court  
3 denied Petitioner's Petition for Writ of Habeas Corpus) to January  
4 30, 2006 (the date Petitioner filed a Petition for Writ of Habeas  
5 Corpus with the San Diego Superior Court) (**26 days**), the statute of  
6 limitations was **not tolled** because statutory tolling is unavailable  
7 for intervals between descending filings. King 340 F.3d at 823.

8 Thereafter, on July 11, 2006, Petitioner filed a second  
9 successive Petition for Writ of Habeas Corpus with the San Diego  
10 Superior Court. On September 15, 2006, the Superior Court denied  
11 the Petition. Shortly after the Superior Court's denial, on  
12 September 22, 2006, Petitioner filed a Petition to Amend the July  
13 11, 2006 Petition. The Superior Court did not rule on the Petition  
14 to Amend.

15 On September 17, 2006, Petitioner filed a Petition for Writ  
16 of Habeas Corpus with the California Court of Appeal. On December  
17 28, 2006, the Court of Appeal denied the Petition.

18 From March 28, 2006 (the date of the Superior Court's denial  
19 of Petitioner's first Petition for Writ of Habeas Corpus) to  
20 September 17, 2006 (the date Petitioner filed a Petition for Writ of  
21 Habeas Corpus with the California Court of Appeal)(**173 days**), the  
22 statute of limitations was **not tolled** because statutory tolling is  
23 not available for intervals when a petitioner is pursuing relief on  
24 successive filings. Dils 260 F.3d at 986.

25 On September 17, 2006, Petitioner filed a Petition for Writ  
26 of Habeas Corpus with the California Court of Appeal. On December  
27 28, 2006, the Court of Appeal denied the Petition.

28 On May 13, 2007, Petitioner filed a Petition for Writ of

1 Habeas Corpus with the California Supreme Court. On September 25,  
2 2007, the California Supreme Court denied the Petition.

3 From December 28, 2006 (the date of the California Court of  
4 Appeal's denial of Petitioner's Petition) to September 25, 2007 (the  
5 date of the California Supreme Court's denial of Petitioner's second  
6 Petition to that court) (**271 days**), the statute of limitations was  
7 **not tolled** because the California Supreme Court found the Petition  
8 to be untimely. Carey 536 U.S. 214, Pace 544 U.S. 408 The Califor-  
9 nia Supreme Court's September 25, 2007 Order denied the Petition  
10 with a citation to In re Clark 5 Cal. 4<sup>th</sup> 750 (1993). Clark  
11 discusses both untimeliness and successive petitions. Id. at 767-  
12 770, 774-781 Clark makes clear that, absent a satisfactory  
13 explanation, all successive petitions are also untimely. "A  
14 successive petition presenting additional claims that could have  
15 been presented in an earlier attack on the judgment is, of neces-  
16 sity, a delayed petition." Id. at 770. A reference to Clark by a  
17 state court is routinely associated with unexplained delay. In re  
18 Saunders 21 Cal. 4<sup>th</sup> 697, 703 (1999) and untimeliness King v.  
19 Lamarque 464 F.3d 963, 965 (9<sup>th</sup> Cir. 2006), Vasquez v. Piller 220  
20 Fed. Appx. 598, 2007 WL 491137 at \*1 (9<sup>th</sup> Cir. 2007).

21 On December 30, 2007, Petitioner filed a Petition for Writ of  
22 Habeas Corpus with this Court. From September 25, 2007 (the date  
23 the California Supreme Court denied Petitioner's Petition) to  
24 December 30, 2007 (the date Petitioner filed his Petition for Writ  
25 of Habeas Corpus with this Court) (**96 days**), the statute of  
26 limitations was **not tolled** because there was no case pending during  
27 that interval. Nino 183 F.3d at 1006

28 Since the statute of limitations was not tolled for a total



1 of **692** days (126 + 26 + 173 + 271 + 96)(1 year, 9 months, 27 days),  
 2 Petitioner failed to file his Petition For Writ of Habeas Corpus  
 3 with this court within the one-year statute of limitations mandated  
 4 in 28 U.S.C. §2244(d)(1)(A).

## 5 **2. Equitable Tolling of the Statute of Limitations**

6 The one-year statute of limitations is subject to equitable  
 7 tolling. Calderon 128 F.3d at 1288 Equitable tolling of the statute  
 8 of limitations is appropriate where a habeas petitioner shows: (1)  
 9 that he has been pursuing his rights diligently, and (2) that some  
 10 extraordinary circumstance stood in his way. Pace 544 U.S. at 418  
 11 When courts assess a habeas petitioner's argument in favor of  
 12 equitable tolling, they must conduct a "highly fact-dependent"  
 13 inquiry. Whalem/Hunt v. Early 233 F.3d 1146, 1148 (9<sup>th</sup> Cir. 2000),  
 14 Lott v. Mueller 304 F.3d 918, 923 (9<sup>th</sup> Cir. 2002) The extraordinary  
 15 circumstances must be the "but-for and proximate cause" of the  
 16 untimely filing. Allen v. Lewis 255 F.3d 798, 800 (9<sup>th</sup> Cir. 2001)

17 In this case, Petitioner has not presented anything to the  
 18 Court to suggest that he is entitled to equitable tolling of the  
 19 statute of limitations. Therefore, the court finds that Petitioner  
 20 has failed to establish that he is entitled to the tolling of the  
 21 statute of limitations pursuant to the doctrine of equitably  
 22 tolling. Accordingly, the Court declines to equitably toll the  
 23 statute of limitations and finds that his Petition For Writ of  
 24 Habeas Corpus filed with this Court is untimely.

## 25 III

### 26 **CONCLUSION AND RECOMMENDATION**

27 After a thorough review of the record in this matter, the  
 28 Court has determined that Petitioner has failed to comply with the

1 AEDPA's statute of limitations and that he is not entitled to  
2 equitable tolling of the statute of limitations. 28 U.S.C.A. §  
3 2244(d).

4 Accordingly, the Court RECOMMENDS that Respondent's Motion  
5 to Dismiss is GRANTED.

6 This report and recommendation of the undersigned Magistrate  
7 Judge is submitted to the United States District Judge assigned to  
8 this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

9 **IT IS ORDERED** that no later than June 16, 2008, any party to  
10 this action may file written objections with the Court and serve a  
11 copy on all parties. The document should be captioned "Objections  
12 to Report and Recommendation."

13 **IT IS FURTHER ORDERED** that any reply to the objections shall  
14 be filed with the Court and served on all parties no later than  
15 June 30, 2008. The parties are advised that failure to file  
16 objections within the specified time may waive the right to raise  
17 those objections on appeal of the Court's order. Martinez v. Ylst,  
18 951 F.2d 1153 (9th Cir. 1991).

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22  
23 DATED: May 19, 2008

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25   
26 Hon. Leo S. Papas  
27 U.S. Magistrate Judge  
28